No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT.

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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Cases Cited

Statute Cited

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Appellee.

BRIEF FOR APPELLANT.

OPINIONS BELOW

The opinion of the Court of Appeals, Cuyahoga County, Ohio, is unreported, see R. 14. The opinion of the Supreme Court of Ohio (R. 15-21) is reported in *Allied Stores of Ohio, Inc., vs. Bowers*, 166 Ohio St. 116; 140 N.E. 2d 411.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered January 30, 1957 (R. 1). On February 13, 1957, the appellant filed application for rehearing (R. 21), and on February 20, 1957, order was entered denying rehearing (R. 1). Notice of appeal to this Court was then filed with Supreme Court of Ohio on April 30, 1957 (R. 2). On June 25, 1957, appellant was granted an extension of time for filing

the record and jurisdictional statement until August 3
1957. On July 29, 1957, appellant was granted a furthe
extension until September 30, 1957. And on October 1
1957, a final extension was granted until October 31, 195
(R. 24). The record and jurisdictional statement were
filed on October 30, 1957. The jurisdiction of the Cour
rests on 28 U. S. C., 1257 (2).

QUESTION

Does a state statute which imposes an *ad valorem* prop
erty tax on personal property held by a resident fo
storage only and which excepts from tax the same propert
held by non-residents, deny residents the equal protectio
of the laws in violation of Section 1 of the Fourteent
Amendment to the Constitution of the United States?

STATUTE INVOLVED

The state statute involved is former Section 5701.08, Re
vised Code, which read as follows:

"As used in Title LVII of the Revised Code:

"(A) Personal property is 'used' within the mean
ing of 'used in business' when employed or utilized i
connection with ordinary or special operations, whe
acquired or held as means or instruments for carry
ing on the business, when kept and maintained as
part of a plant capable of operation, whether actuall
in operation or not, or when stored or kept on han
as material, parts, products, or merchandise; but mer
chandise, or agricultural products belonging to a non
resident of this state is not used in business in thi
state if held in a storage warehouse for storage only
Moneys, deposits, investments, accounts receivable
and prepaid items, and other taxable intangibles ar
'used' when they or the avails thereof are being applie
or are intended to be applied, in the conduct of th
business, whether in this state or elsewhere.

"(B) 'Business' includes all enterprises conducte
for gain, profit, or income and extends to persona
service occupations."

STATEMENT

The facts of this case have been stipulated as follows:

"It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

"1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th Street, Cleveland, Ohio.

"2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

"3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage warehouses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

"4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

(3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

"5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

"6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit Taxing District: Akron		Group 1	Group 2
January, 1954	$387,115	349,178	37,937
February, 1953	378,417	341,332	37,085
March, 1953	389,929	351,716	38,213
April, 1953	417,284	376,390	40,894
May, 1953	494,263	445,825	48,438
June, 1953	367,460	331,449	36,011
July, 1953	243,136	219,309	23,827
August, 1953	239,966	216,449	23,517
September, 1953	239,988	216,469	23,519
October, 1953	187,533	169,155	18,378
November, 1953	267,046	240,876	26,170
December, 1953	198,826	179,341	19,485
Total Monthly Inventory	$3,810,963	3,437,489	373,474
Average Monthly Inventory Value	317,580	286,457	31,123

"7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

"County: Hamilton
Taxing District: Cincinnati

		Group 1
January, 1954	$275,830	275,830
February, 1953	283,380	283,380
March, 1953	283,390	283,390
April, 1953	263,898	263,898
May, 1953	236,180	236,180
June, 1953	186,090	186,090
July, 1953	254,580	254,580
August, 1953	297,130	297,130
September, 1953	326,630	226,630
October, 1953	333,410	333,410
November, 1953	314,900	314,900
December, 1953	265,950	265,950
Total Monthly Inventory	$3,321,368	3,321,368
Average Monthly Inventory Value	276,780	276,780

"Note: Items representing group 2 were warehoused within the retail store.

"8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

"County: Cuyahoga
Taxing District: Cleveland

		Group 1	Group 2
January, 1954	$320,668	286,228	34,440
February, 1953	364,299	325,173	39,126
March, 1953	397,766	355,046	42,720
April, 1953	397,590	354,889	42,701
May, 1953	411,818	367,589	44,229
June, 1953	393,720	351,434	42,286
July, 1953	381,860	340,848	41,012
August, 1953	351,424	313,681	37,743

September, 1953	355,689	317,488	38,201
October, 1953	430,625	384,376	46,249
November, 1953	419,682	374,608	45,074
December, 1953	356,778	318,460	38,318
Total Monthly Inventory	$4,581,919	4,089,820	492,099
Average Monthly Inventory Value	381,826	340,818	41,008

"9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin
Taxing District: Columbus

		Group 1	Group 2
January, 1954	$150,453	127,885	22,568
February, 1953	170,263	144,724	25,539
March, 1953	168,855	143,527	25,328
April, 1953	185,847	148,678	37,169
May, 1953	187,934	150,347	37,586
June, 1953	168,370	134,696	33,674
July, 1953	171,660	145,911	25,749
August, 1953	179,229	152,345	26,884
September, 1953	187,929	159,740	28,189
October, 1953	203,896	163,117	40,779
November, 1953	189,647	113,788	75,859
December, 1953	159,065	103,386	55,679
Total Monthly Inventory	$2,123,148	1,688,144	435,004
Average Monthly Inventory Value	176,929	140,679	36,250

"10. Group 1 in the A. Polsky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

"Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as lino-

leum, carpets and rugs), pre-packaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

"The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

"11. Group 2 in the A. Polsky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

"Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

"The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

"12. All the items of merchandise stored in the several warehouses of appellant were finished products in condition for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customers as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers directly from warehouse stocks of merchandise. None

of the items stored in the said warehouse were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

"13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

The Board of Tax Appeals of Ohio recognized and held that the Appellant's merchandise was for storage only, but nevertheless affirmed the assessment because of its lack of jurisdiction to declare a statute unconstitutional.

SUMMARY OF ARGUMENT

The argument for purposes of this case is the same as appears under the equal protection topic of the brief submitted in the companion case of *The Youngstown Sheet and Tube Company v. Stanley J. Bowers,* No. 9, October Term, 1958, and the same summary of arguments on the equal protection question presented there applies to this case:

1. Section 5701.08, Revised Code, is unconstitutional for the reason that it taxes personal property held by a residen for sorage only while at the same time excepting such property when owned and stored by a non-resident with the result that residents are denied equal protection of the laws.

2. The residence of a taxpayer is not a characteristic of the property being taxed or of the type of business in which the taxpayer engages in this state. Where the tax is against property used in business, a classification of taxpayers to be valid must rest upon some difference in the quality or kind of property owned and the business use to which it is put by the taxpayer in the taxing state.

3. Taxpayers who own the same kinds of property and who use that property in the same ways for the same business purpose belong to the same class and must be treated equally.

4. The exception from tax granted to non-residents for personal property held for storage only is an integral part of Section 5701.08, Revised Code of Ohio, and cannot be severed from that section. When the Ohio Legislature came on to reconsider the exception in 1955, it amended it in certain respects but did not remove it. The only part of the exception which was removed was the language which limited the benefit of the exception to nonresidents and which discriminated against residents. Thus if any language can be removed from the statute, it is the phrase, "belonging to nonresidents of this state", since the Legislature by its action has indicated that it does not consider such language to be a necessary part of the exception.

5. Section 5701.08, Revised Code of Ohio, is unconstitutional insofar as it imposes a discriminatory tax upon the business property of residents held for storage only and must to that extent be voided.

ARGUMENT

I. Former Section 5701.08, Revised Code of Ohio, is Unconstitutional to the Extent That it Operates to Levy a Resident When Held For Storage Only While at the Same Time Excepting the Merchandise of a Nonresident When Similarly Held.

The same arguments made against the levy and assessment of the tax upon the Youngstown Sheet & Tube Company in the companion case of *Youngstown Sheet & Tube Company v. Bowers,* No. 9, October Term, 1958, also apply to this case. Excepting for a discussion of points peculiar to the instant appeal, appellant adopts here all that has been said concerning the equal protection question in the brief submitted in *Youngstown, supra.*

The Ohio Supreme Court through its syllabus in *Allied Stores of Ohio, Inc. v. Bowers,* 166 Ohio St. 116, 140 N. E. 2d 411, (1957), held as follows:

> "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

Thus the Ohio Court decided that even though former Section 5701.08, Revised Code of Ohio, was discriminatory to resident taxpayers, the section would nevertheless have to be upheld because it expressed the intention of the Ohio Legislature.

The answer to this approach is that insofar as former Section 5701.08, discriminates against residents by impos-

ing an unequal tax burden upon them, it is unconstitutional and void, and should have been declared so by the Ohio Court.

Section 5701.08 defines property "used in business" to include all storage property, excepting that held by non-residents for storage only. In the two cases of *General Cigar Co., Inc. v. Peck*, 159 Ohio St. 152, 111 N. E. 2d 265 (1953), and *B. F. Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N. E. 2d 525 (1954), the Ohio Court construed the term "storage only" as applicable to inventories of personal property owned by a non-resident and stored in this State, so long as they were not subjected to any processing or manufacturing operations during storage.

In the *Goodrich* case *supra*, the record shows that the Goodrich Company stored retail merchandise in warehouses for shipment to its department stores in Ohio. The Ohio Court held that such merchandise was entitled to exception from the tax.

In the more recent case of *The Higbee Co. v. Bowers*, BTA No. 32136 (1958), see Appendix for the opinion, the Ohio Board of Tax Appeals, pursuant to a remand of the case by the Ohio Supreme Court in *Grinnell Corp. et al. v. Bowers*, 167 Ohio St. 267, 147 N. E. 2d 657, (1958), decided that a non-resident corporation which operates a large department store in the city of Cleveland, Ohio, was entitled to exception from the tax on its retail merchandise kept at its warehouse in Cleveland and later taken to the store and sold there.

This holding was not appealed to the Ohio Supreme Court and it therefore establishes the rule of law for retail merchandise held for storage only.

The Appellant in the instant case conducts the same kind of business, stores the same kind of merchandise, and disposes of it in the same way as did the Goodrich and Higbee

companies. Despite these similarities which place appellant in the same class with non-resident department stores, it has been denied equal treatment by being required to pay a tax which non-residents are relieved of paying. The resultant discrimination is not based upon any difference between the type of business being conducted by taxpayers of the type of merchandise being stored. It rests squarely upon a difference in residence. Since the Ohio tax is against property used in business, a discrimination in treatment based solely upon the taxpayer's residence is invalid and denies Ohio residents equal protection of the laws.

II. The Decision of Grinnell Corp. et al., v. Bowers, 167 Ohio St. 267, 147 N. E. 2d 657 (1958).

The Ohio Supreme Court in *Grinnell Corp., et al., v. Bowers,* 167 Ohio St. 267, 147 N. E. 2d 657, (1958), held that the storage only exception did not cover retail merchandise stored in a warehouse and delivered directly to the customer, but that it did apply where the merchandise was transported over a public highway from the warehouse to the store and sold at the store. Consequently, the appellant waives its claim at tax exception as to the merchandise listed in paragraph 10 of the stipulation (R. 11). But the merchandise listed in paragraph 11 (R. 11, 12), is entitled to exception, and the assessment which has been issued against it should be reversed.

CONCLUSION

For the reasons above stated, and for the further reasons presented by the brief in *The Youngstown Sheet & Tube Company v. Bowers*, No. 9, October Term, 1958, the appellant respectfully requests that the assessment against its property held for storage only be reversed as unconstitutional and judgment entered for the appellant.

Respectfully submitted,

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APPENDIX

Before the Board of Tax Appeals,
Department of Taxation, State of Ohio
The Higbee Company, Appellant, v. Stanley J. Bowers Tax Commissioner of Ohio, Appellee.

Entry

(Dated July 2, 1958.)

This cause and matter came on further to be considered by the Board of Tax Appeals following the receipt by the Board of Tax Appeals of a mandate from the Supreme Court of Ohio in the case of The Higbee Company, Appellant, v. Stanley J. Bowers, Tax Commissioner, Appellee, No. 35249 on the docket of that Court.

Upon consideration thereof the Board of Tax Appeals finds that under date of June 19, 1956, there was filed with the Board of Tax Appeals of the appellant above named from a final order of the Tax Commissioner dated May 29, 1956, in and by which final order the Tax Commissioner denied appellant's application for review and redetermination of an increased tangible personal property tax assessment made against it with respect to the year 1955.

The Board of Tax Appeals, by entry dated May 14, 1957, affirmed the final order of the Tax Commissioner complained of for reasons more fully set out in said entry. In brief, the Board of Tax Appeals found that appellant's merchandise and supply inventory located in 2 buildings in the City of Cleveland (one located on 11th Street and the other on Euclid Avenue at 66th Street) in the average amount of $5558,372 (appellant's Exhibit A) was not being "held in a storage warehouse for storage only" within the meaning of those words as used in Revised Code Section 5701.08 and, therefore, the merchandise and supplies must

be considered as "used in business in this state" and subject to Ohio taxation for the year 1955.

Thereafter, and within the time prescribed by law, the appellant filed an appeal with the Supreme Court of Ohio from said order of the Board of Tax Appeals; which appeal in the Supreme Court was docketed under the style and case number above noted. Thereafter, under date of February 5, 1958, the Supreme Court of Ohio, upon a consideration of the case presented by such appeal, rendered and entered a decision and judgment in and by which the matter was remanded to the Board of Tax Appeals for further consideration in accordance with the opinion rendered in the case of The Higbee Company, Appellant, v. Bowers, Tax Commissioner, Appellee, 167 Ohio St. Reports at page 267. This opinion is the same opinion rendered by the Supreme Court in 10 foreign corporation inventory cases and is commonly referred to as the Grinnell Corp. case.

The cause was resubmitted to the Board of Tax Appeals upon appellant's notice of appeal filed herein under date of June 19, 1956, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented to this Board at the original hearing on September 19, 1956, and the testimony and evidence presented to us on April 18, 1958, pursuant to a request filed by counsel for appellant for an additional hearing. We also have before us the original and supplemental briefs filed by counsel and the opinions of the Supreme Court of Ohio in the cases of General Cigar Company, Inc. v. Peck, Tax Commissioner, 159 Ohio St. Reports at page 152; B. F. Goodrich Company v. Peck, Tax Commissioner, 161 Ohio St. Reports at page 202; and The Higbee Company v. Bowers, Tax Commissioner, 167 Ohio Reports at page 267.

The appellant, The Higbee Company, is a Delaware corporation qualified to do business in Ohio and it operates a general retail department store on the Public Square in Cleveland, Ohio. The Higbee Company has 2 warehouse facilities wherein are placed items of merchandise and supplies not immediately needed for display or sale purposes at its Public Square store. One warehouse, owned by The Higbee Company, is located on West 11th Street in Cleveland, Ohio, about one-half to three-fourths mile from the Public Square store. It is a 5 story structure containing about 100,000 square feet of usable storage space for such bulky items as furniture, mattresses, electrical appliances, television sets, etc. Supplies such as wrapping paper, tissue paper, cardboard boxes, etc. are also placed in this warehouse and such supplies are considered by this Board to be "merchandise" within the meaning of that term as the same is used in Revised Code Section 5701.08. See case of B. F. Goodrich v. Peek, supra.

The other warehouse is not owned by The Higbee Company, but is rented by it, and it consists of the first 2 floors of a 4 story building located at 66th Street and Euclid Avenue in Cleveland, Ohio, which location is approximately 5 miles from the Public Square store. It has about 36,000 square feet of usable storage space for carpets, rugs, chinaware, etc.

Employees of The Higbee Company operate both warehouses. No retail sales are made therein nor do any customers of The Higbee Company enter these warehouses for any purpose.

When the merchandise, except carpets and rugs, in these warehouses is moved therefrom its destination is to either Higbee's Public Square store or the homes or business places of Higbee's customers. In all instances the merchandise moves over the public highways.

Appellant claims that all the items of merchandise and supplies located in the warehouses that were moved from the warehouses to The Higbee Company Public Square store in the period from February 1, 1954, through January 31, 1955, were not subject to Ohio taxation for the year 1955 under the provisions of Revised Code Section 5701.08, the pertinent portion of which section reads as follows:

"* * *

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when stored or kept on hand as materials, parts, products, or merchandise; but merchandise * * * belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only. * * *."

Appellant says that certain of its merchandise and supplies moved over the public highways when transfer thereof was made from its warehouses to its Public Square store and, therefore, within the scope of Judge Taft's opinion in the case of The Higbee Company v. Bowers, supra, said merchandise and supplies are thereby excepted from taxation. A search of the statutes fails to disclose wherein movement of merchandise over a public highway either excepts merchandise from taxation or subjects such merchandise to taxation, and we believe that Judge Taft used this illustration merely to highlight his views relative to the tax status of materials and parts used by a non-resident manufacturer, and that he did not mean his illustration to apply to merchandise.

Appellant also claims that carpets and rugs, although not moved from the 66th Street warehouse to the Public Square store, are not subject to taxation for the reason that said carpets and rugs do not go directly from the warehouse to the customer, but that the same are picked

up from the warehouse by an independent company hired by The Higbee Company and taken to the carpet laying company's place of business for cutting, shaping and binding and then delivered by this independent operator to the Higbee customer. The appellant's claim may be stated in another way, to-wit: All its merchandise and supplies located in its 2 warehouses are not subject to Ohio taxation except only that merchandise which is eventually delivered by The Higbee Company directly from its warehouses to its customers.

In support of this claim the appellant cites the syllabus in the case of The Higbee Company v. Bowers, Supra, the pertinent portion of which syllabus reads as follows:

> "Property cannot be considered as 'held in a storage warehouse for storage only' within the meaning of Section 5701.08, Revised Code, as it read prior to September, 1955, in those instances where it is located in the place * * * from which it is in effect to be delivered by the taxpayer directly to a customer."

Originally the appellant claimed that none of its merchandise and supply inventory located in its two warehouses was subject to taxation for the year 1955 for the reason that said inventory, in the average value of $558,372, was kept in the warehouses for storage only. At the second hearing the appellant reduced its claim and now says that only such warehouse inventory as was delivered by appellant directly to its customers was taxable and that the balance of such inventory in the average amount of $233,178 was not subject to taxation. Its

original claim and its reduced claim is set out in Exhibit A as follows:

"Goods in Storage
1955 Personal Property Tax Return

	Original Claim (Corrected)	Revised Claim
Supplies	$ 63,946	$ 63,946
Merchandise		
Furniture	314,130	98,592
Carpets and Rugs	57,934	57,934
Miscellaneous (66th St.)	19,715	2,441
Miscellaneous (11th St.)	102,647	10,265
Total Merchandise	$494,426	$169,232
Total Supplies & Merchandise	$558,372	$233,178"

All the merchandise and supplies, in the average value of $233,178.00, are shown by the evidence to have been moved from the warehouse to appellant's Public Square store during the last 11 months of the year 1954 and the first month of the year 1955 except "carpets and rugs" in the average value of $57,934.00

In the course of the opinion written by Judge Taft in the case of The Higbee Company v. Bowers, supra, he uses this language which would appear to be pertinent to appellant's business operation:

> "Obviously property may be 'stored * * * as material, parts, products, or merchandise' although not 'kept on hand as material, parts or merchandise.' *Keeping property 'on hand' necessarily means keeping it readily available.* Merely storing it does not require any such meaning. Thus, the word 'stored' and 'kept on hand' apparently describe two different situations. When it undertook to provide against having property 'held for storage only' considered as property 'used in business,' the General Assembly said nothing about any such treatment for property 'kept on hand.' By what it said, it apparently contemplated such treatment only for property merely 'stored.' Although it might reasonably be argued that property 'kept

on hand' could sometimes be considered as 'held for storage only,' we believe that the General Assembly, in its provision for property 'held for storage only,' did not express an intent to limit the word 'stored.' Thus, where property is 'kept on hand as material, parts, products or merchandise,' it can not be considered as 'held for storage only.' (Emphasis ours.)

"* * *

"Further, we believe that, where shipments are regularly made by a taxpayer from a warehouse directly to his customers, it is more reasonable to say that property to be so shipped from such warehouse is 'kept *on hand* as material, parts, products or *merchandise*' than to say that it is merely 'stored * * * as material, parts, products or merchandise.' In such an instance, the taxpayer, instead of expanding his place of business to provide space for the merchandise he is selling, may in effect have adopted the warehouse as a part of his selling operation. This may be particularly apparent where the operation of the warehouse and shipments therefrom directly to customers are by the taxpayer instead of by some independent warehouse operator (as in case No. 35237). Cf. last proviso of third paragraph of Section 5711.05, Revised Code. Of course, more occasional shipments directly to customers might not require a finding of a keeping on hand rather than a storage operation.

"In the *Goodrich* case, no question was raised as to whether there could be a holding for storage only if shipments were regularly made by the taxpayer from his warehouse directly to his customers. Apparently, the property there held for sale was to be shipped to other locations and sales of it thereafter made from those other locations. Also, no question was raised in that case as to whether material to be used in manufacturing could be considered as 'held for storage only' if located at or near the place where it was to be so used. Also, no such questions were raised or considered in the *General Cigar* case. * * *."

The Tax Commissioner says that appellant has adopted the warehouses as a part of its selling operation and that all of its items of merchandise and supplies, whether in the Public Square building or in either of the warehouses, are "kept on hand" to be used in appellant's business activities and are, therefore, subject to Ohio taxation.

Although we are inclined to agree with the Tax Commissioner, we do not believe that the decisions of the Supreme Court in the foreign corporations inventory cases, above noted, support said view.

The Tax Commissioner also says that the syllabus in the case of The Higbee Company v. Bowers, supra, clearly indicates, by the use of the words "in effect" in said syllabus, that appellant's rugs and carpets are delivered by the taxpayer directly from the warehouse to a customer even though the delivery is actually made by an agent hired by Higbee. In this respect we are inclined to agree with the Tax Commissioner in his interpretation of the Supreme Court's decision. In each instance the sale of the carpeting was consummated while the carpeting was still in the warehouse, and it was delivered from the warehouse operated by appellant to appellant's customers by an agent hired by appellant. It does not appear to us to be significant that the agent first moved the carpeting to its own place of business for cutting and binding before moving it on to the customer's premises for installation. In this connection it might also be noted that we are not here concerned with an independent warehouse operation such as was involved in the case of Philip Morris v. Bowers, case No. 32145 on the docket of the Board of Tax Appeals. The Higbee Company rents the 66th Street warehouse, but it is operated and controlled by Higbee employees.

Upon a consideration of the case as thus presented to us, and giving effect to the conclusions above noted, it is

found that the merchandise and supplies located in appellant's 2 warehouses in the following average values:

Supplies	$ 63,946.00
Furniture	98,592.00
Miscellaneous (66th St.)	2,441.00
Miscellaneous (11th St.)	10,265.00
Total	$175,244.00

are excepted from taxation for the year 1955 as being merchandise held in a storage warehouse for stoarge only by a nonresident of this State.

The final order of the Tax Commisioner is, therefore, modified to give effect to this finding and, as thus modified, the final order of the Tax Commissioner is affirmed.